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**CASE NOS. 2000-LHC-1497
2000-LHC-1498**

**OWCP NOS. 18-67978
18-70094**

In the Matter of:

**GARY HARTMAN,
Claimant,**

vs.

**SEA-LAND SERVICES,
Employer,
and
F.A. RICHARD & ASSOCIATES,
Carrier.**

Appearances:

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For Employer Sea-Land Services, Inc.
and Carrier F.A. Richard & Associates.

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This claim arises under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. §901 *et seq.* A formal hearing was held in Long Beach, California, on January 10, 2001. All parties, except the Director of the Office of Workers' Compensation ("OWCP"), were represented by counsel, and the following exhibits were admitted into evidence during the hearing: Administrative Law Judge's Exhibits 1 through 3, ("ALJX-1", "ALJX-2" and "ALJX-3"),¹ Claimant's Exhibits ("CX") 1 through 15 (Tr.9), and Employer's Exhibits ("EX") 1 through 19 (Tr.9).² On June 1, 2001, the Court received Claimant's Deposition of April 11, 2001, which is identified herein as CX-18. Tr.185.

After the hearing, Employer submitted the January 4, 2001 medical report and post-trial deposition of Dr. James London, which will be identified herein as EX-19; EX-20, respectively. The Court also received the post-trial depositions of Dr. James Loddengaard dated January 19, 2001 (CX-16), and Dr. John Sasaki dated February 9, 2001 (CX-17). Counsel for both parties provided Proposed Findings of Fact and Conclusions of Law, which have also been made part of the record.³

Claimant contends that as a result of his industrial injuries occurring on May 2, 1998 and March 3, 1999, he is unable to perform any alternative employment, and therefore, he is totally and permanently disabled. Employer argues that Claimant is only partially and permanently disabled as suitable alternative employment has been identified.

STIPULATIONS

The parties have agreed to the following stipulations:

¹ Administrative Law Judge's Exhibits are Claimant's Pre-Trial Statement ("ALJX-1"), Employer's Pre-Trial Statement ("ALJX-2"), and Director's Pre-Trial Statement/Statement of Position ("ALJX-3"). See Transcript, ("Tr.") at 7.

² The record notes that EX-19, January 4, 2001 report of Dr. James London, would be submitted with Dr. London's post-trial deposition. Tr.11.

³ ALJX-4 is Claimant's Proposed Findings of Fact and Conclusions of Law; ALJX-5 is Employer's Proposed Findings of Fact and Conclusions of Law.

1. The parties are subject to the Act;
2. Claimant and Employer Sea-Land Services were in an employer-employee relationship at the time the injuries occurred;
3. The date disability commenced for the first injury was May 3, 1998 through June 15, 1998;
4. Disability commenced for the second injury on March 4, 1999, and continues;
5. Claimant was temporarily and totally disabled from May 4, 1998 through June 15, 1998, and again from March 4, 1999 through October 19, 1999;
6. The alleged injuries arose out of and in the course of employment;
7. Employer had timely notice of the injuries;
8. Claimant filed timely claims for compensation;
9. Employer is currently providing compensation and medical benefits;
10. Claimant's average weekly wage at the time of the first injury was \$1,228.99;
11. Claimant's average weekly wage at the time of the second injury was \$1,337.93;
12. Employer is seeking relief from the Special Fund.

The Court accepts all of the foregoing stipulations as they are supported by substantial evidence of record. See *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 fn. 2 (1985).

ISSUES IN DISPUTE

1. Date of maximum medical improvement;
2. The extent of disability;

3. Section 7 medical benefits;⁴
4. Section 8(f) relief;
5. Attorney's fees and costs.

Summary of the Decision

The undersigned concludes that Claimant reached maximum medical improvement on October 20, 1999. Employer has not established suitable alternative employment. Therefore, Claimant is entitled to permanent total disability benefits as of October 20, 1999 at the maximum compensation rate of \$871.76.

The Court further finds that Employer is entitled to Section 8(f) relief.

SUMMARY OF EVIDENCE

Claimant's Testimony and Background

At the time of the hearing, Claimant Gary Hartman ("Claimant") was a 55-year old former maritime mechanic. Tr.12. Claimant graduated from Junction City Junior and Senior High School in 1964. EX-5, p.17. Thereafter, Claimant entered the United States Navy and specialized in submarine periscopes. Tr.51. After Claimant was discharged from the Navy, he began working in the paint business as a salesperson. Tr.52. In addition to selling paint, Claimant was responsible for stocking shelves, mixing paint and unloading trucks. Tr.52.

In 1983, Claimant attended Mount San Antonio College where he completed a two-year course in air conditioning, heating and refrigeration, and received an Associate of Science degree. Tr.53; EX-5, p.17. Beginning in 1986, Claimant worked for two years as a service manager at Cypress Heating and Air Conditioning ("Cypress"). Tr.53; EX-5, p.20. Claimant testified that his first back injury occurred while working for Cypress; he pulled muscles in his back after lifting a large air-conditioning compressor. Tr.57. In 1988, Claimant began working as a maintenance mechanic for Brea Community Hospital where he was responsible for modernizing the facility's air-conditioning system, as well as inspecting and repairing all the electrical and plumbing equipment. EX-5, p.20. Thereafter, Claimant worked for Pacific Coast Refrigeration and Air Conditioning as a service technician. On or about January 1991, Claimant was hired

⁴ Although this issue was raised at the hearing, Employer has not disputed Claimant's entitlement to Section 7 benefits, and therefore, this matter will not be addressed in the following analysis.

by Employer Sea-Land Services as a journeyman mechanic repairing its air-conditioning, electrical and plumbing systems, as well as painting and line-stripping its parking lots. Tr.54.

In 1996, Claimant was transferred to the tire department. Tr.55. Claimant stated that this work was very strenuous as it included lifting and mounting large tires onto trucks and trailers. Tr.55. On May 3, 1998, Claimant injured his low back, hip and legs when two large truck tires fell from a pile striking him and knocking him to the ground. Tr.56. After his initial treatment at St. Mary's Hospital Emergency Room, Claimant was seen by his family practitioner, Dr. Stephen Thacker, who prescribed pain medication and physical therapy. EX-16; Tr.57. After a six-week recovery period, Claimant returned to light-duty work. Tr.58. However, he continued to experience pain in his lower back and left leg. Tr.59.

After notifying his supervisor that the "tire lane" work was aggravating his back, Claimant was assigned to washing reefers.⁵ Tr.61. As a reefer washer, Claimant would use a utility tractor rig ("UTR") to haul a reefer to the washing station, pry open its doors, and then place a washing machine inside the container. When the machine did not remove all of the debris, Claimant would manually hose down the container. Tr.62. On March 3, 1999, as Claimant was opening tight latches on a series of containers, he developed low back pain with radiation to the left thigh. Tr.66; EX-4, p.9. By lunch time, Claimant was experiencing incapacitating pain. Tr.67. He was taken to Priority One Medical Group and treated by Dr. John Burns, who diagnosed low back sprain with spasm and recommended several medications and temporary total disability.⁶

On March 8, 1999, Dr. James Roe conducted his first examination of Claimant, who reported symptoms of low back pain and severe sciatic burning. Tr.68. Dr. Roe diagnosed herniated nucleus pulposus syndrome with left lower extremity radiculopathy; recommended temporary total disability, ordered a magnetic resonance imaging ("MRI") scan of the lumbar spine; and prescribed Daypro, Soma, Vicodin, and physical therapy. EX-4, p.10. From March 16, 1999 to April 20, 1999, Claimant received thirteen physical therapy treatments which included soft tissue mobilization, joint mobilization, instruction on home exercises and ice (EX-4, p.11); however the therapy aggravated his condition. Tr.69. Claimant's March 11, 1999 MRI scan revealed a four millimeter disc bulge.⁷ Tr.69.

⁵ A reefer is a refrigerated cargo container used for shipping food. Tr.61.

⁶ Dr. Burns prescribed Toradol IM, Trilisate, Valium, Darvocet. EX-4, p.9.

⁷ Dr. London's June 8, 1999 report noted Dr. Jennifer Kao's impression of Claimant's MRI scan: 1) postcentral L4-5 disc protrusion with associated annular fissure; 2) posterior L5-S1 disc bulge/protrusion along with postero-inferocentral disc extrusion, 3.7 mm in AP diameter; 3) mild bilateral L4-5 and L5-S1 inferior foraminal stenosis; 4) mild bilateral L4-5 and L5-S1 facet arthropathy. EX-4,

In July 1999, Claimant underwent a L5-S1 laminectomy and bilateral foraminotomy. Tr.70; EX-4, p.5. Although Dr. Roe considered the procedure a success, Claimant testified that the pain returned. Tr.70. After Dr. Roe relocated his practice, he referred Claimant to Dr. W.J. Irvine for further treatment. Claimant explained that he was unable to communicate with Dr. Irvine and disagreed with his opinion that Claimant could return to work. Tr.72. Although he returned to Employer to obtain light-duty work, Claimant was told that there was none available, and that he should consider taking a severance “buy-out.” Tr.72. Claimant accepted the “buy-out” of approximately \$25,000 (\$14,000 after taxes). Tr.73.

Claimant’s attorney referred him to Dr. James Loddengaard, a board-certified orthopedist, who conducted his first orthopedic examination on January 24, 2000. Claimant reiterated his symptoms of low back pain and sciatic burning pain. Tr.73; CX-13, p.29. Claimant testified that he was also examined by Employer’s orthopedic surgeon Dr. James London. Claimant denied that Dr. London recommended that he was capable of returning to work. Tr.73.

After determining that further surgery would not improve Claimant’s condition, Dr. Loddengaard suggested that Claimant consult with a pain management specialist. Since Claimant wanted a specialist in his area, his physical therapist recommended Dr. John Sasaki, who first examined Claimant on April 6, 2000. Tr.75. According to Claimant, Dr. Sasaki diagnosed a pinched nerve, and recommended that Claimant take anti-depressants and sleep medication. Tr.77. Claimant was scheduled for epidural injections; however the procedure was postponed after Claimant was diagnosed with a malignant right kidney mass. Tr.79. Claimant’s right kidney was removed on July 27, 2000. Tr.79. Claimant testified that he has no disability as a result of the kidney cancer treatment Tr.81.⁸ He further stated that but for his back condition, he would not be precluded from returning to work. Tr.81.

On December 8, 2000, Claimant resumed his visits with Dr. Sasaki, who rescheduled the epidural injections. Tr.81. Claimant testified that Dr. Roe administered three epidural injections in 1998, but they did not resolve his pain symptoms. Tr.83. At the time of the hearing, Claimant was seeing Dr. Sasaki once every three weeks, and Dr. Loddengaard once every five weeks. Tr.84.

In describing his typical day, Claimant stated that he usually wakes up several times a night due to

p.11.

⁸ Dr. Loddengaard’s September 21, 2000 report noted that Claimant’s oncologist recommended that Claimant required three more months of recovery from his kidney cancer surgery before resuming his pain management program. CX-13, p.43.

In his November 30, 2000 examination report, Dr. Loddengaard indicates that pain management is part of Claimant’s current treatment plan. CX-13, p.46.

back pain. Tr.84. After Claimant awakens in the morning, he showers and stretches, he sits in his special recliner. Tr.91. He also loads and unloads the dishwasher, and washes clothes. Tr.91. On average, Claimant drives five to twenty miles a day. Tr.152.

Claimant testified that his main hobby is working on his “hotrod” truck. Tr.94. He stated that since his accident he can only dust and wax the vehicle. Tr.96. Normally, he would spend four to five hours preparing his truck for a show; however now he can only clean it for five minutes. Tr.106. Claimant recalled being at the “cruise show”⁹ on June 10, 2000 for approximately one hour. Tr.107. Claimant acknowledged that he and his wife drove to Kansas in 1999 for her mother’s funeral, but the trip took an additional two days to complete for a total of four days. Tr.98.

Claimant also discussed his trip to the Nethercutt Museum in Sylmar, California, which included a forty-minute drive to the museum, a two-hour tour and a fifty-five minute drive back to his residence. When Claimant returned home he took pain medication and rested. CX-18, p.31.

Claimant further testified that he could not physically handle the requirements of the jobs outlined in Employer’s Labor Market Survey. Tr.113. Specifically, Claimant stated that he could not tolerate the unarmed security guard job’s requirement of standing for two to four hours. Tr.113. Claimant testified that he was unable to work 40 hours a week. Tr.117. He also noted the side-effects of his pain medications: shakes, drowsiness, diarrhea, and dry mouth. Tr.119. Claimant testified that he would return to work if his pain symptoms are resolved. Tr.120.

On cross-examination, Claimant indicated that he did not lie down during his visit to the car museum. Tr.132. On the night of the dinner theater, Claimant acknowledged that he left his house at five o’clock that evening, drove for approximately one hour to the theater, sat through the dinner and show, and completed the one-hour drive home without lying down. Tr.135. When questioned about his alleged short-term memory problems, Claimant testified that he was driving to Dr. Loddengaard’s office and suddenly forgot his destination; he had to call his wife at work for directions. Tr.138. However, at trial, Claimant did remember the route he took to Dr. Loddengaard’s office. Tr.138. Claimant also testified that his medication does not preclude him from driving on a daily basis. Tr.139.

Claimant confirmed that while working for Cypress, he was responsible for “teaching air-conditioning” to the apprenticed workers; that he spent nine years in the paint industry as an inside salesman; that as an outside salesman he used his sales and product knowledge to advise contractors on

⁹ A “cruise show” or “cruise night” is an event where owners of classic cars and trucks display their vehicles to the public. Tr.125.

the appropriate materials for particular jobs. Tr.142. At Sea-Land Services, Claimant's positions included: painter, reefer washer, refrigeration mechanic, power-shop mechanic, and chassis mechanic.¹⁰

Claimant reiterated that he is unable to perform the jobs identified in the Labor Market Survey due to the limitations from his back condition. Tr.145. He conceded that he did not know the specific requirements of these jobs, and that he has not sought gainful employment since his surgery. Tr.146.

Claimant indicated that prior to the May 1998 accident, he experienced intermittent back problems for which he sought treatment from Dr. Thacker. Tr.148. He also confirmed that he was taking his medication the day he visited the car museum, as well as the night he went to the dinner theater. Tr.150.

Barbara Jean Hartman

Barbara Hartman, Claimant's wife of twenty-five years, testified about Claimant's daily activities. Tr.22. Mrs. Hartman works Monday through Friday; she leaves the house around 7:00 a.m. and returns around 6:00 p.m. Tr.23. Mrs. Hartman described Claimant's average day: he wakes up between 8:00 and 10:00 o'clock in the morning, has breakfast, showers, watches television, runs errands, drives to a friend's house for coffee and doughnuts, attends a "car cruise."¹¹ Tr.24. She noted that when Claimant is home, he spends more time in bed than sitting in his specially padded chair. Tr.25. She estimated that Claimant spends three to five hours laying down during the day. Mrs. Hartman sleeps in a separate bedroom as Claimant constantly changes positions and prevents her from sleeping through the night. Tr.26. She confirmed that Claimant has had back problems within the past ten years, and has been treated by Dr. Thacker. Tr.27. Mrs. Hartman also stated that prior to the 1998 accident, Claimant was very active around the house: plumbing, gardening, and painting. Tr.28. After the second accident, Claimant was unable to perform these tasks; he could no longer maintain his classic truck. Mrs. Hartman testified that she has only seen Claimant sweep the truck with a long-feathered duster; she does not recall the last time he washed the vehicle. Tr.29.

Since the March 1999 accident, Mrs. Hartman and Claimant attended one car show for about six

¹⁰ Claimant testified that as a chassis mechanic he was responsible for repairing any part of the chassis which included the electrical lights, latches, wheel bearings, air system and brakes. Tr.144.

¹¹ See note 9, *supra*.

hours; Claimant has also attended a few local “cruise nights”¹² on his own. Tr.31-32. Mrs. Hartman indicated that Claimant has difficulty carrying groceries and taking the large trash bins to the curb. Tr.32. Based on her observations, she did not believe that Claimant could handle the physical demands of working. Tr.38.

When her mother was seriously ill, Mrs. Hartman and Claimant would make yearly trips to Kansas, usually a two-day drive. Tr.49. However, when they returned for her mother’s funeral, it took them four days to complete the trip because Claimant could not tolerate more than five hours of driving at a time due to his back condition. Tr.49.

On cross-examination, Mrs. Hartman opined that if Claimant spent 20 to 30 minutes cleaning his classic truck he would “be in a considerable amount of pain.” Tr.40. She declared that Claimant is capable of driving an hour to a truck show, parking, lifting up the hood, walking around for two hours, and driving another hour home, but he would not do it comfortably. Tr.41.

Dr. James Loddengaard

Dr. James Loddengaard is one of Claimant’s treating physicians. His testimony was taken via post-trial deposition on January 19, 2001. CX-16. Dr. Loddengaard is a board-certified orthopedic surgeon,¹³ and has been treating longshore and maritime workers for approximately five years. CX-16, p.7. Based on a referral from Claimant’s counsel, Dr. Loddengaard began treating Claimant on January 24, 2000. CX-16, p.6. At the time of the hearing, Dr. Loddengaard had examined Claimant on nine occasions.

During the January 24, 2000 examination, Claimant reported moderate to severe low back pain; increased pain with sitting, driving, or walking; left leg pain and weakness. CX-16, p.8. Claimant also remarked that his surgery resolved his right leg pain, but only temporarily relieved his left leg pain. Dr. Loddengaard ordered a lumbar MRI (February 2000 MRI) and neurological evaluation and prescribed Flexeril, a muscle relaxant, and Ibuprofen. CX-16, p.9. Dr. Loddengaard confirmed that neither the February 2000 MRI, nor the EMG and nerve conduction studies revealed a definitive cause for the left leg radicular pain. CX-16, p.32. He also testified that the February 2000 MRI report (EX-6, p.48) noted mild diffuse degenerative changes and mild foraminal stenosis at L5-S1, but no focal disc protrusion or disc

¹² Id.

¹³ Dr. Loddengaard’s curriculum vitae was submitted as Plaintiff’s Exhibit 1 to the deposition transcript.

herniation. CX-16, p.10. He declared that results from a diskography and psychological profile were required before he could recommend Claimant's future course of treatment.¹⁴ CX-16, p.18.

Dr. Loddengaard did not find Claimant to be permanent and stationary, nor capable of returning to light-duty work; however he was "hopeful that at some point [Claimant] can sit, stand and walk for an eight-hour day, which according to Claimant, he is not able to do at this time." CX-16, pp.19-20. At a minimum, Claimant would be permanently restricted from repetitive bending and stooping, and lifting more than 20 to 25 pounds. CX-16, p.23.

Dr. Loddengaard never spoke to vocational expert Amy Wise, but he did review and conclude that the proposed job descriptions were not compatible with Claimant's physical condition. CX-16, p.22.

Claimant was last seen by Dr. Loddengaard on January 4, 2001 (See examination notes, CX-15, p.48) during which Claimant reported that he had become less active due to the kidney cancer, and that his back pain had decreased. CX-16, p.25. Dr. Loddengaard opined that if Claimant leads a very sedentary life, he can control his pain. He also indicated that Claimant's limping may be attributable to bursitis of the left hip; however Dr. Loddengaard was uncertain if this condition was related to Claimant's underlying problems. CX-16, p.26.

On cross-examination, Dr. Loddengaard conceded that he has not reviewed the medical reports of Claimant's initial treating doctor, Dr. Roe. CX-16, p.27. He did not learn about Dr. Irvine's treatment and authorization for Claimant's return to work until the day before his deposition. CX-16, p.29. He was unaware of Claimant's 1990 back injury and history of intermittent back problems. CX-16, p.30. Dr. Loddengaard testified that as of January 2000, Claimant did not have a limp. CX-16, p.32.

Claimant returned to Dr. Loddengaard on February 14, 2000; Dr. Loddengaard reported the following:¹⁵ "EMG negative left, right old S1 consistent with previous surgery, nerve conduction velocity's normal. MRI, no root compression or recurrent disc." CX-16, p.34. When asked about further surgery, Dr. Loddengaard remarked that Claimant was not a surgical candidate; however he indicated that surgery could be appropriate at some future point. CX-16, p.36.

¹⁴ As of Dr. Loddengaard's January 19, 2001 deposition, neither the diskography nor the psychological profile had been conducted.

¹⁵ The written notes of the February 14, 2000 examination were not submitted as an exhibit; Dr. Loddengaard read these findings into the record. CX-16, p.33.

Dr. Loddengaard further testified that he relied, in part, on Claimant's recitation of symptoms and limitations in determining that the Labor Market Survey positions were physically inappropriate. CX-16, p.37. Based on his notes from the May 10, 2000 examination, Claimant did not suffer from a limp. CX-16, p.38. According to the July 27, 2000 progress report, Claimant was recovering from cancer surgery, and the cancer was not contributing to his low back pain. CX-16, p.38. On September 21, 2000, Dr. Loddengaard documents Claimant walking with a Trendelenburg gait.¹⁶ Claimant was also reported walking with a limp in Dr. Loddengaard's November 30, 2000 physician's report. CX-16, p.40; CX-13, p.46.

Although Dr. Loddengaard did not review the sub rosa films, he did opine that Claimant's activities on the day he attended the car museum were consistent with his reported limitations. CX-16, p.42.

Dr. Loddengaard stated that the MRI findings were objective evidence that the degenerative changes in the facet joints could cause Claimant's low back pain; however he conceded that these results are not conclusive proof that this condition is producing pain. CX-16, p.49. Within the last twelve months, Claimant has not undergone much treatment and the physical therapy has not improved his condition. CX-16, p.51. When asked to characterize Claimant's work restrictions, Dr. Loddengaard opined that based on "[Claimant's] statements about his activity tolerance, . . . I would not think he'd be capable of working more than perhaps four hours a day maximum for sedentary-type work with the ability to change positions at will, and no lifting over . . . ten to fifteen pounds."¹⁷ CX-16, p.55. Dr. Loddengaard testified that he did not review Dr. London's medical reports. CX-16, p.55.

Dr. Loddengaard further noted that Claimant sustained a back injury from the May 1998 industrial accident and experienced recurring back pain until his March 3, 1999 injury. CX-16, p.63. Dr. Loddengaard confirmed that Claimant had a pre-existing disability in his low back at the time of the March 1999 injury, and that the March 1999 injury aggravated that pre-existing condition. CX-16, p.64. The resulting disability from the March 1999 injury was materially and substantially greater as a result of the pre-existing disability in Claimant's low back attributable to the May 1998 incident. CX-16, p.64.

¹⁶ Dr. Loddengaard testified that a Trendelenburg gait is "when you lean your body to the side over your leg as you walk. So instead of having your trunk move forward in a straight fashion, you're leaning to the side each time you step on that leg." CX-16, p.39.

¹⁷ The Court notes that it is difficult to ascertain Dr. Loddengaard's assessment of Claimant's work capacity as of October 20, 1999. Initially, Dr. Loddengaard testifies that Claimant could not return to light-duty work, and that none of the positions listed in the Employer's Labor Survey (EX-5) were compatible with Claimant's current physical restrictions. (CX-16, pp.19-22). However, he later states that Claimant "might feel well enough to do these [positions listed in Labor Survey] on a four-hour day basis or occasionally." CX-16, p.47.

Upon further direct examination, Dr. Loddengaard disagreed with Dr. Irvine's assessment that Claimant was able to return to work in December 1999. Dr. Loddengaard testified that he did not consider the source of the referral during his evaluation of Claimant; his only concern was improving Claimant's condition. CX-16, p.58.

Dr. John Sasaki

Dr. John Sasaki was deposed on February 9, 2001, in lieu of appearing at trial. See CX-17. Dr. Sasaki is one of Claimant's treating doctors. Dr. Sasaki is a pain management specialist with a double-board certification in pain management and pain medicine. CX-17, p.6. He also received his board certification in anesthesiology, and was chairman of the department of anesthesiology at Pomona Valley Hospital Medical Center from 1986 to 1990. See Curriculum Vitae of Dr. John Sasaki, CX-17, pp.46-47.

Claimant was referred to Dr. Sasaki by Dr. Loddengaard. CX-17, p.7. On April 6, 2000, Dr. Sasaki conducted his first evaluation and recorded Claimant's medical history from which he diagnosed left L5 and left S1 radiculopathy (pain and nerve dysfunction attributable to the L5 and S1 nerve root), left low back pain, left lumbar facet arthropathy,¹⁸ sleep disturbance and depression, a status post L5/S1 laminectomy and discectomy. CX-17, p.9. Dr. Sasaki noted that the radiculopathy diagnosis was based on Claimant's subjective complaints: pain, tingling or weakness in the legs, as well as objective findings: left leg raising producing radiating pain in the leg, and weaknesses of specific muscles. CX-17, p.9. The diagnosis of left lumbar facet arthropathy was derived from the MRI findings; Dr. Sasaki reviewed the February 2000 MRI which revealed "a laminectomy defect¹⁹ evidenced at the L5-S1 level where mild diffuse degenerative changes at the facet joints . . ." CX-17, p.10. Dr. Sasaki recommended epidural injections with an epidurogram to document the disposition of the injectate. CX-17, p.12.

Claimant returned to Dr. Sasaki on June 16, 2000 for a follow-up visit; Claimant had been recently diagnosed with a right kidney mass and was undergoing oncological testing, and therefore, Dr. Sasaki deferred further treatment until Claimant's cancer was stabilized. CX-17, p.12.

On December 8, 2000, Claimant resumed treatment with Dr. Sasaki. Claimant received

¹⁸ "Facet Arthropathy" denotes a degenerative change of the joint of the spine. CX-17, p.10.

¹⁹ "Laminectomy defect" is a post-operative change from Claimant's lumbar laminectomy. CX-17, p.11.

authorization for epidural injections which were administered on January 16, 2001. The procedure entailed an eight-inch needle fluoroscopically injected into the left S1 neuroforamen and the left S1 dorsum foramen with the contrast injection documenting the spread of the contrast material along the subject nerve root. Dr. Sasaki testified that “there was little contrast seen along the left L5 nerve root signaling epidural scarring,” which indicates that Claimant has some scarring from his prior surgery and that such scarring is attached to the L5 nerve root. Dr. Sasaki also remarked that the prior lumbar surgery “may have contributed to the destabilization of the spine at the L5-S1 level,” which would “accelerate any degenerative change in the facet joint at that level.” CX-17, pp.14-15. Dr. Sasaki stated that as of his February 9, 2001 deposition, he had not seen Claimant since the January 16, 2001 procedure. CX-17, p.16.

Dr. Sasaki noted that if the transforaminal epidural injection, the placing of steroid medication by the nerve root, is unsuccessful, then other procedures would be considered.²⁰ He discussed other aspects of pain management: medication,²¹ physical therapy, and psychological support.

For Claimant’s low back pain, Dr. Sasaki recommended the following procedures: diagnostic median branch block,²² diskography with an additional lumbar fusion,²³ or intradiscal electrothermal annuloplasty.²⁴ CX-17, p.26.

²⁰ Dr. Sasaki described the following as potential remedies for Claimant’s condition:

“Transforaminal Lysis” is a procedure where a string-tip catheter threaded through a needle “mechanically passes along the nerve root trying to push the adhesions out of the way.”

“Epiduroscopy” is the placing of a fiberoptic scope through the sacral hiatus, which is guided towards the nerve roots allowing direct visual guidance of the lysis (dissolution) of the epidural adhesions.

“Epidural spinal cord stimulation” is the implanting of a neuroelectrode into the neuroepidermal space causing either inhibition or modulation of the pain impulses from the leg to the brain thus decreasing the pain. CX-17, pp.17, 21-22.

²¹ Claimant has been prescribed Wellbutrin, an anti-depressant and Kenalog, a steroid medication. CX-17, p.23.

²² “Median Branch Block” is a block of the nerve that innervates the facet joint which is intended to relieve pain caused by the joint. CX-17, p.25.

²³ “Diskography” is a radiograph of the spine for visualization of an intervertebral disk, after injection into the disk itself of an absorbable contrast medium. See *Dorland’s Illustrated Medical Dictionary* 492 (28th ed. 1994).

²⁴ “Intradiscal Electrothermal Annuloplasty” is a procedure where a catheter is threaded through the inner portion of the disc annulus and heated to decrease the lumbar disc pain. CX-17, p.26. Dr. Sasaki started using this procedure six months before his deposition and has performed it on twelve patients. *Id.* at 37.

Dr. Sasaki opined that Claimant has “severe pain . . . that would prevent him from working in any capacity at this time.” CX-17, p.27. He further noted that Claimant’s activities captured by the sub rosa films were not inconsistent with his symptomatology, and that he encouraged Claimant to “be as active as possible.” CX-17, p.28. Dr. Sasaki did not review the surveillance films. CX-17, p.33.

According to Dr. Sasaki, Claimant has not reached maximum medical improvement; he has only performed one procedure on Claimant and has not yet seen the effects of that procedure. CX-17, p.18. He also noted that it was premature for a determination of whether Claimant would improve and be capable of light-duty work. CX-17, p.29.

Although he is qualified to recommend work restrictions, Dr. Sasaki deferred to Dr. Loddengaard to assess Claimant’s disability rating and physical limitations. CX-17, p.30. Dr. Sasaki has not discussed Claimant’s work restrictions with Dr. Loddengaard. He acknowledged that his opinion and course of treatment is based, in part, on Claimant’s subjective account of his symptoms and limitations. CX-17, p.31. Dr. Sasaki confirmed that the pain in Claimant’s left lower extremity can fluctuate depending on the amount of irritation to the nerve root, an assessment which by necessity relies on Claimant’s subjective complaints.²⁵ CX-17, p.32.

On cross-examination, Dr. Sasaki admitted that he did not review the medical reports of Drs. Roe, Irvine or London. He acknowledges that the EMG finding of right S1 nerve root pathology was inconsistent with Claimant’s subjective complaints. CX-17, p.34. Dr. Sasaki also indicated that treatment for the radicular pain, beyond the epidural injections, was speculative. At the time of his deposition, Dr. Sasaki had not begun treating Claimant’s low back pain. CX-17, p.35. Dr. Sasaki could not confirm that the facet arthropathy was causing Claimant’s low back pain. CX-17, p.36. He also noted that treatment of Claimant’s low back pain was speculative. CX-17, p.37.

With respect to Claimant’s ability to perform sedentary work, Dr. Sasaki reiterated his position that:

[Claimant] would have difficulty with even a [sic] sedentary work due to the pain that he has and the comorbidity that are [sic] related to that lack of concentration. He exhibits some depression on examination.

CX-17, p.40.

²⁵ Dr. Sasaki’s prior testimony also noted objective evidence of epidural scarring based on the lack of contrast along the left L5 nerve root during the epidural injection administered on January 16, 2001. See page 12, *supra*.

Dr. James London

Dr. James London, a board-certified orthopedic surgeon and general orthopedist since 1975, examined Claimant on Employer's behalf. See Curriculum Vitae of Dr. James London, EX-15. Dr. London's testimony was taken via a post-trial deposition on April 10, 2001. See EX-20.

Dr. London examined Claimant on three occasions: June 4, 1999, October 20, 1999 and December 20, 2000. EX-2, 3, 4, and 19. During the initial examination, Dr. London recorded Claimant's history and symptoms, reviewed Claimant's medical records and x-rays of his pelvis, hips and back, and conducted a physical examination. The physical examination entailed: range of motion testing, observation of Claimant's gait, stretch tests, neurological testing of lower extremities, and measuring of Claimant's thigh and calf circumferences. EX-20, p.7. Dr. London concluded that Claimant: sustained a back injury on March 3, 1999; had a "bilateral Trendelenburg gait,"²⁶ slightly worse on the left side than the right side;" a one millimeter disc bulge at L4-5; a three-to-four millimeter disc bulge at L5-S1, greater on the right side; mild thecal sac impingement; no canal stenosis; no definite nerve root impingement; and mild L5-S1 facet joint arthritis. EX-20, p.8; EX-4, p.13. Dr. London opined that the disc bulge at L5-S1 was causing Claimant's low back pain and sciatic nerve pain; he noted the possibility of a laminectomy and discectomy if Claimant did not respond to conservative treatment. EX-20, p.8.

Claimant's second evaluation was performed on October 20, 1999; the report from this visit is dated October 26, 1999. See EX-3. Dr. London confirmed Claimant's history, recorded present complaints, performed a physical examination, and took x-rays. He also reviewed additional medical reports by Dr. Roe, including the July 30, 1999 operative report which documented Claimant's laminectomy²⁷ and bilateral laminotomy²⁸ at L5-S1. EX-20, p.9. Dr. London declared that Claimant had aggravated a pre-existing condition that resulted from the May 1998 injury, and that the aggravation was caused by the March 1999 industrial injury. Dr. London further found Claimant's condition to be permanent and stationary and recommended work restrictions: no prolonged sitting or standing without the option of changing positions, no lifting or carrying over 40 pounds, no forceful pushing or pulling with upper extremities or prolonged work in an awkward position. EX-20, p.10. The work restrictions were "appropriate to prevent exacerbation" of pain. EX-20, p.10.

²⁶ See note 16, *supra*.

²⁷ A "laminectomy" is an excision of the posterior arch of a vertebra. See *Dorland's Illustrated Medical Dictionary* 898 (28th ed. 1994).

²⁸ A "laminotomy" is a division of the lamina of a vertebra. See *Dorland's Illustrated Medical Dictionary* 898 (28th ed. 1994).

As of the October 1999 visit, Claimant's symptoms included: occasional low back pain, radiation of pain into the left lower extremity when lifting, fatigue in the lower back after prolonged walking, left leg weakness, left-sided limp. Despite these complaints, Dr. London determined that Claimant's gait was normal, his symptoms had plateaued, and therefore, Claimant had reached permanent and stationary status. EX-3, pp.4-5; EX-20, p.11.

Claimant's third examination was performed on December 20, 2000; Dr. London reviewed additional medical records,²⁹ and confirmed Claimant's current complaints and symptoms. Upon review of Dr. Irvine's December 1999 work restrictions, Dr. London opined that they were similar to the limitations he recommended in October 1999. EX-20, p.13. He noted that the electrodiagnostic studies conducted on February 11, 2000 revealed right-sided S1 nerve root pathology consistent with a right-sided L5-S1 disc problem, but Claimant did not report radicular complaints on the right side during the December 2000 examination. EX-20, p.14. Dr. London concluded that "there is nothing that has caused nerve root irritation or nerve root damage on the left side or in any of the nerve roots on the right side, except for the first nerve root." EX-20, p.15. He further opined that Claimant's kidney cancer was responsible for his complaint of right flank pain reported during his April 10, 2000 emergency room visit, noting that the attending physician conducted a work-up of Claimant's kidney, not back, and diagnosed urethral colic, as well as chronic low back pain. EX-20, p.16.

In sum, Dr. London found that Claimant was permanent and stationary, that the October 1999 work restrictions were applicable, and that future medical care such as orthopedic treatment, medications and epidural injections may be required. EX-20, p.17. He noted that recommending future medical care was not inconsistent with finding Claimant permanent and stationary as this treatment will not "alter his overall symptomology or prognosis." EX-20, p.18. The epidural injections administered by Dr. Sasaki on January 16 and February 15, 2001, would only provide transient relief as the effectiveness of Kenalog (steroid) would last only a few months. EX-20, p.19.

Dr. London also testified about Claimant's pain management program. He indicated that Claimant received epidural injections on two prior occasions which provided only temporary relief. Dr. London also stated the potential risks from these injections: internal bleeding and nerve damage. EX-20, pp.20, 24. He disagreed with Dr. Sasaki's conclusion that post-operative scarring on the left L5 was causing Claimant's low back and radicular pain: the MRI scan taken after surgery (CX-10) did not show scarring on the left side; the post-operative EMG studies (CX-11) did not show any nerve abnormalities on the left side or L5 nerve root damage on either side. EX-20, p.22. Dr. London further explained that it would be "most unusual for the L5 nerve root to be involved with scar tissue at L5-S1 disc. Usually, it is the S1

²⁹ In his January 4, 2001 report, Dr. London includes a thirteen-page summary of the medical records he reviewed for Claimant's case. EX-20, pp.165-178.

nerve root.” He opined that Claimant’s symptoms would be more consistent with an S1 root as “his pain radiated down into the lateral portion of his foot, which would be more of an S1 distribution.” EX-20, p.22. Dr. London also rejected Dr. Sasaki’s opinion that the laminectomy was responsible for the destabilization of Claimant’s spine as there was no objective evidence to support this conclusion, nor did Claimant’s other treating physicians make similar findings. EX-20, p.23.

Dr. London expressed his reservations about the procedures proposed to resolve Claimant’s radicular pain.³⁰ Although Claimant does have some scar tissue on the right side, surgery to remove the tissue is futile as it will inevitably reform leaving a greater amount of scar tissue. EX-20, p.25.

Dr. London also expressed concerns about the proposed treatment for Claimant’s low back pain as the median branch nerve block would provide only temporary relief and not result in meaningful long-term improvement. EX-20, p.31. He questioned Dr. Sasaki’s recommendation of a lumbar fusion, noting that none of Claimant’s orthopedic surgeons suggested this procedure as there was no evidence to warrant this type of treatment. EX-20, p.33.

Based on counsel’s description of Claimant’s activities on the day of the car museum tour, Dr. London opined that Claimant’s behavior was not consistent with someone suffering from extreme back pain. EX-20, p.35. He also testified that Claimant’s permanent and stationary status was not affected by his participation in a pain management program as this treatment is not going to alter the underlying condition on a permanent basis. EX-20, p.37.

On cross-examination, Dr. London stated that Claimant’s referral to Dr. Sasaki for treatment and for the epidural injections was reasonable. EX-20, p.42. However, he remarked that the procedures included in Claimant’s pain management program would likely lead to complications, rather than resulting in long-term improvement. EX-20, p.43. Dr. London also stated that it was appropriate for Claimant to be walking, performing light resistance exercises and stretching. EX-20, p.54.

Surveillance Evidence/ Investigator Testimony

Beginning May 24,1999, at Employer’s request, Claimant’s daily activities were filmed by

³⁰ Dr. London did not advocate the transforaminal lysis epidural or the epiduroscopy due to the lack of conclusive evidence that scar tissue existed at the L5 level, the risk of nerve damage, and the minimal success he has witnessed from these treatments. He further noted that the “epidural spinal cord stimulation” would only temporarily address Claimant’s pain but not alter his underlying condition. EX-20, p.29. Lastly, Dr. London questioned implanting an intrathecal catheter to medicate the epidural area as Claimant was only experiencing moderate relief with medication. EX-20, pp.26-30.

investigator Eric Salcido of Horsemen Incorporated. Tr.157. Mr. Salcido has been an investigator for approximately thirteen years. He also attended the San Diego Police Academy and was an infantry soldier for the United States Army. Tr.158.

Upon review of the surveillance evidence, the Court finds that the sub rosa tapes (EX-18) are consistent with the testimony of Mr. Salcido summarized below, with the exception of his description of Claimant's gait.³¹

Mr. Salcido testified that on June 10, 2000, he observed Claimant at approximately 4:45 in the afternoon working on his classic truck. Claimant was seen exiting the vehicle, lifting the hood of the truck, replacing the air changer, bending and leaning into the engine compartment, slightly leaning and stretching to clean the windshield, fender walls and various engine parts. Tr.160. Claimant maintained this activity for approximately twenty-five minutes. Tr.161. Thereafter, Mr. Salcido followed Claimant on a ten-minute drive to a car show in Claremont, California. Claimant arrived at 5:20 p.m; Mr. Salcido observed Claimant walking and standing for about one hour. Tr.163. Mr. Salcido did not notice Claimant limping or exhibiting signs of pain. Tr.164.

On July 22, 2000, Mr. Salcido filmed Claimant taking his car to the Montclair Car Wash at approximately 10:00 a.m., and buying a box of doughnuts at Kristy's doughnut shop in Pomona. About an hour after his return, Claimant was seen leaving his residence and entering his vehicle. Tr.167. Claimant drove a few miles to a residence and picked up another individual. Tr.168. Claimant then drove approximately one hour to the Nethercutt Museum in Sylmar, California. Tr.168. Mr. Salcido observed Claimant walking through the museum for about forty-five minutes; he did not see Claimant sitting or walking with a limp. Tr.169. Thereafter, Mr. Salcido watched Claimant exit the building, walk a short distance across the parking lot, descend a flight of stairs,³² cross the street and enter the San Sylmar Building at 1:15 p.m. At approximately 3:45 p.m., Claimant emerged from the building, walked across the street, ascended the stairs and returned to his vehicle. Tr.171. Claimant arrived at his residence around 4:50 p.m. Tr.172. Mr. Salcido testified that during the seven hours of surveillance Claimant did not display

³¹ Mr. Salcido testified that he did not notice any physical restriction in Claimant's movement nor any overt signs of discomfort while filming Claimant. Tr.161. However, the video does show Claimant walking at a slow and guarded pace. As none of the medical experts have reviewed the sub rosa films or testified about the nature of Claimant's gait in these tapes, the Court is not in a position to make a ruling on this matter.

³² Mr. Salcido estimated that Claimant descended 20 to 25 steps. Tr.170. Upon review of the surveillance tapes, Claimant appears to be walking down one set of stairs which consisted of approximately five or six steps; however the exact number cannot be determined as the view of the stairway is obstructed in the videotape.

signs of physical restriction or discomfort. Tr.173.

Mr. Salcido last observed Claimant on December 16, 2000. Claimant, his wife and daughter were seen leaving the residence at approximately 5:00 p.m. Claimant drove to a dinner theater in Tustin, California. After the one-hour drive, Claimant was seen standing outside the facility for approximately thirty minutes. Tr.174.

On cross-examination, Mr. Salcido acknowledged that another investigator had observed Claimant on four previous occasions. Tr.176. Mr. Salcido denied seeing Claimant limping while under surveillance. Tr.180.

Vocational Expert Testimony

On behalf of Employer, Amy Wise, a vocational case manager, prepared a Labor Market Survey dated December 22, 1999 ("Labor Survey" or "Survey"). EX-5. Ms. Wise noted that she relied on the medical reports of Drs. London and Roe, and that only Dr. London's October 26, 1999 permanent and stationary report included defined work restrictions. Tr.190-193. Ms. Wise did not consult with Dr. Loddengaard as he was not Claimant's treating doctor at the time the Labor Survey was performed. Tr.190. She recently learned that Dr. Loddengaard determined that Claimant could not physically handle the positions contained in the Labor Survey. Tr.192.

In addition to consulting the medical records of Drs. London and Roe, Ms. Wise reviewed the following information: Claimant's Sea-Land job application, job descriptions of his eight positions at Sea-Land, Claimant's educational history and vocational experience, and his transferable skills as noted in his Sea-Land application. EX-5, pp.15-21. She utilized the Employment Research & Information Supply System (ERISS) to outline Claimant's pre-injury functioning capacity, which revealed his aptitude, physical demand levels, general educational development, specific vocational preparation ("SVP"), and work temperaments. EX-5, p.22. Ms. Wise also considered Claimant's physical restrictions from prolonged sitting or standing without the option to change positions, lifting or carrying more than 40 pounds, and forceful pushing or pulling with upper extremities. The Survey proposed that the following positions were compatible with Claimant's condition and readily available in the labor market: outside sales representative; inside sales representative; unarmed security guard; and appointment setter. EX-5, pp.23-24.

Ms. Wise testified that she verified with the employers the amount of prolonged sitting, standing and walking required for each position, but she did not inquire about provisions for laying down as this factor was not included in Dr. London's work restrictions. Tr.194-196. She did confirm that the appointment-

setter position would allow Claimant to alternate positions and stretch as needed. Tr.198. Ms. Wise did not discuss Claimant's medication regimen, but noted that employers would require drug testing to verify that Claimant was only taking prescribed medications. Tr.197. Ms. Wise indicated that she did not intend to contact Drs. Loddengaard or Sasaki about Claimant's status or work restrictions. Tr.200.

When questioned by Employer's counsel, Ms. Wise testified that the Labor Survey identified jobs that were also compatible with Dr. Irvine's December 1999 work restrictions as they were quite similar to Dr. London's.³³ Tr.200.

LEGAL ANALYSIS

Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with the claimant. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 58 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (partial or total). The Act defines disability as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, a claimant must demonstrate an economic loss in conjunction with a physical or psychological impairment in order to receive a disability award. *Sproull v. Stevedoring Service of America*, 25 BRBS 100, 110 (1991). A disability requires a causal connection between a worker's physical injury and his inability to obtain work. If the claimant shows he cannot return to his prior job, it is the employer's burden to show that suitable alternate employment exists which he can perform. Under this standard, a claimant may be found to have sustained no loss, a total loss or a partial loss of his wage-earning capacity.

Maximum Medical Improvement

Claimant contends that his condition will not become permanent and stationary until "sometime in the year 2001." ALJX-4, p.15. Employer argues that Claimant reached maximum medical improvement on October 20, 1999 based on the testimony of the examining physician Dr. London. The undersigned finds that the weight of the evidence supports Employer's contention that Claimant's condition reached maximum medical improvement on October 20, 1999.

³³ Dr. Irvine's December 29, 1999 report noted that Claimant was able to return to light-duty work; work limitations included: no excessive bending or stooping; no lifting, pushing or pulling over 15 pounds. CX-7, p.10.

An injured worker's impairment is deemed permanent if the condition has reached maximum medical improvement or if the impairment has continued for a lengthy period of time and appears to be of a lasting duration. *Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). "Maximum medical improvement" and "permanent and stationary" are legal concepts developed in case law to ascertain when a claimant's condition has moved from a temporary to a permanent status. The *AMA Guides for the Evaluation of Permanent Impairment*, 4th ed. (1993) also offer some guidance:

Report of Medical Evaluation (Permanent Medical Impairment)

4. Stability of the medical condition

- a. The clinical condition is stabilized and not likely to improve with surgical intervention or active medical treatment; medical maintenance care only is warranted.
- b. The degree of impairment is not likely to change substantially within the next year.
- c. The patient is not likely to suffer sudden or subtle incapacitation.

AMA Guides, p.11.

Permanency does not, however, mean unchanging. Permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date. See *Watson*, 400 F.2d at 654; *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988). Likewise, a prognosis stating that the chances of improvement are remote is sufficient to support a finding that a claimant's disability is permanent. *Walsh v. Vappi Constr. Co.*, 13 BRBS 442, 445 (1981); *Johnson v. Treyja, Inc.*, 5 BRBS 464, 468 (1977).

The date a claimant's condition becomes permanent is a question of fact to be determined by the medical evidence and not by economic or vocational factors. Thus, the medical evidence must establish the date on which the claimant has received the maximum benefit of medical treatment such that his condition is not expected to improve. See *Trask*, 17 BRBS at 60; *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984).

Employer argues that maximum medical improvement was established on October 20, 1999, the date on which Dr. London determined that Claimant's symptoms had plateaued and that further treatment was unlikely to improve his condition. EX-20, p.11. The undersigned credits Dr. London's conclusion

over that of Claimant's treating physicians, Drs. Loddengaard and Sasaki. While the opinions of treating doctors are entitled to great weight regarding medical treatment, (*Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998)), the Court does not have to accept these findings if they are unreasonable. *Amos*, 153 F.3d at 1054. Moreover, a treating doctor's opinion is not necessarily conclusive regarding a claimant's physical condition or extent of disability. See *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

The Court is not persuaded by the opinions of Drs. Loddengaard and Sasaki that Claimant has not reached maximum medical improvement for the following reasons. Drs. Loddengaard and Sasaki did not begin treating Claimant until several months after the March 1999 injury,³⁴ they did not review the medical records of Claimant's previous treating physicians Drs. Roe and Irvine, or the examination reports of Dr. London, or observe the surveillance tapes of Claimant's activities. Also, Dr. Loddengaard was unaware of Claimant's history of intermittent back problems, including the 1990 back injury; he did not learn of Dr. Irvine's treatment and recommended work restrictions until the day before his deposition. Therefore, it is unclear how Drs. Loddengaard and Sasaki were able to assess and comment on the progress of Claimant's condition since the March 1999 injury without reviewing his medical history.

In addition, Drs. Loddengaard and Sasaki relied, in part, on Claimant's subjective recitation of symptoms. Although the Court does not entirely discount Claimant's testimony, it is reluctant to accept his representations without some corroborating objective evidence. Both Drs. Loddengaard and London testified that the February 2000 MRI did not show a cause for Claimant's left-sided radicular symptoms; Dr. Sasaki agreed that the right S1 nerve root pathology was inconsistent with Claimant's subjective complaints. There is also some inconsistency in Claimant's reporting of symptoms as Dr. Roe's October 15, 1999 report states "on examination [Claimant] is able to walk without limping. He can walk on heels and toes and displays better muscle power than before." CX-8, p.17. On October 20, 1999, Dr. London notes Claimant's complaints of "frequent limping due to pain and weakness in the left lower extremity." EX-3, p.4. Dr. Loddengaard does not make any references to Claimant's gait or limp until the seventh visit on September 21, 2000. CX-13, p.44.

Questions are also raised by Claimant's statements to Dr. Loddengaard during his May 2000 visit that he "can't do ladders or stairs. Stairs . . . but not repeatedly. One flight of stairs and he is 'done for the day.'" CX-13, p.40. However, on July 22, 2000, the surveillance tapes capture Claimant descending a stairway consisting of approximately five or six steps, completing a two-hour museum tour, and ascending the same stairway without any noticeable signs of discomfort. He also managed to complete the one-hour drive home. Thus, the opinions of Drs. Loddengaard and Sasaki become less persuasive based on their reliance

³⁴ Dr. Loddengaard first examined Claimant on January 20, 2000 (CX-16); Dr. Sasaki first examined Claimant on April 6, 2000. CX-17.

on Claimant's representations.

The undersigned also finds that Dr. Loddengaard's testimony and course of treatment are not consistent with his opinion that Claimant remains temporarily disabled. Dr. Loddengaard confirmed that Claimant was not currently a surgical candidate, that Claimant's condition did not improve after twelve months of physical therapy, and that the only prescribed treatment was a pain management program. CX-16, p.36, 51. He further testified that "in the last eight or nine months . . . [Claimant] has not really had any treatment as such." CX-16, p.36. Although Dr. Loddengaard noted that surgery might be appropriate in the future, the mere possibility of surgery, by itself, does not preclude a finding that Claimant's condition is permanent. See *Worthington v. Newport News Shipbuilding & Dry Dock*, 18 BRBS 200, 202 (1986). Moreover, Claimant testified that he was referred to a pain management specialist after Dr. Loddengaard indicated that there was nothing he could do as a surgeon to relieve Claimant's back pain. Tr.74. Therefore, Dr. Loddengaard's prescribed course of treatment is more aligned with a finding that Claimant has reached maximum medical improvement. See *Leech v. Service Engineering Co.*, 15 BRBS 18, 21, (1982)(a condition is considered permanent if a claimant is no longer undergoing treatment with a view toward resolving his condition).

Likewise, Dr. Sasaki's opinion is not supported by the evidence of record. Dr. Sasaki conceded that the recommended procedures for treating Claimant's radicular and back pain were speculative. CX-17, p.35. Dr. Sasaki explained that he did not find Claimant's condition permanent and stationary because he "has only performed one procedure (epidural injections) on [Claimant] and at this time [he doesn't] know the effect of that one procedure." CX-17, p.18. The Court finds that Dr. Sasaki's "wait and see" approach is unreasonable and not consistent with the applicable case law. See *Watson*, 420 F.2d at 654 (permanency can be found even if there is a remote possibility that the employee's condition may improve at some future date). Moreover, Claimant testified that the epidural injections he received from Dr. Roe in 1998 did not resolve his symptoms. Tr.83. Dr. London also noted that these injections provide only temporary relief and are not intended to alter the underlying condition. See EX-20, p.42. Thus, Dr. Sasaki's opinion that Claimant's condition has yet to reach permanent status is without merit. Dr. Sasaki's assessment is subject to further scrutiny as he is not an expert in orthopedic surgery, but rather a pain specialist and certified anesthesiologist. Dr. Sasaki conceded that he was uncertain if the proposed surgical procedures³⁵ would alleviate Claimant's pain, and that he did not know how Claimant would respond to the epidural injections. As noted above, Dr. London, a board-certified orthopedic surgeon, testified to the effects and risks of the epidural injections; he also questioned Dr. Sasaki's recommended procedures³⁶ citing

³⁵ Procedures included: transforaminal lysis; epiduroscopy; epidural spinal cord stimulation; median branch block; and intradiscal electrothermal annuloplasty. See notes 20, 22, 24, *supra*.

³⁶ *Id.*

the lack of objective findings to warrant this course of treatment, and the risk of generating more scar tissue. EX-20, p.43. Thus, Dr. Sasaki's opinion is not reliable as it suggests surgical procedures that are beyond his area of expertise which are not substantiated by the medical evidence or endorsed by Claimant's treating and examining orthopedic surgeons.

In light of the medical evidence presented, the undersigned concludes that Claimant reached maximum medical improvement on October 20, 1999. On this date, Dr. London declared that Claimant's symptoms had plateaued, and that he "didn't think any further treatment was likely to alter [Claimant's] condition." EX-20, p.11. He also noted that the February 2000 MRI scan and the EMG studies confirmed that there was no nerve root irritation or nerve root damage, and thus no objective evidence for Claimant's left-sided radicular complaints.³⁷ EX-20, p.14. Dr. London convincingly testified that the surgical treatments³⁸ endorsed by Dr. Sasaki were either unwarranted based on the objective findings, or unlikely to permanently alter Claimant's condition. Dr. London's assessment is strengthened by the fact that none of Claimant's treating orthopedic surgeons have suggested these procedures. In fact, Claimant's current treating orthopedic surgeon, Dr. Loddengaard, conceded that surgery was not a viable option at this time. Lastly, Dr. London testified that recommending future medical care for Claimant was consistent with his prior determination as those provisions were not likely to change the symptomatology, but rather provide temporary relief. EX-20, p.18.

In addition, Dr. London's opinion is substantiated by the findings of Dr. Irvine, who briefly served as Claimant's treating physician and declared Claimant's condition permanent and stationary on December 30, 1999. Although Dr. Irvine's diagnosis was made a few months later, the undersigned still finds that Dr. London's opinion accurately reflects the time at which Claimant's condition reached permanent status. Claimant's symptoms noted during the October 20, 1999 examination: low back pain, left lower extremity pain and weakness after prolonged standing, and frequent limping due to pain in the left lower extremity (EX-3, p.4), are almost identical to the complaints observed by Dr. Irvine during his December 1999 examinations.³⁹ CX-6; CX-7. Also, the work restrictions imposed by Drs. London (*supra*, page 15) and

³⁷ Dr. Sasaki did testify that the January 2001 epidural injection revealed "little contrast along the left L5 nerve root signaling scarring" (CX-17, p.14.); however Dr. London did not address this issue in his testimony.

³⁸ See note 35, *supra*.

³⁹ Prior to declaring Claimant permanent and stationary after the December 29, 1999 visit, Dr. Irvine examined Claimant on December 3, 1999; he noted subjective complaints: left lower extremity pain and weakness, low back pain, and objective findings: slight restriction of motion of LS spine, normal gait and no limp. CX-6, p.9.

Irvine⁴⁰ are quite similar, except that Dr. Irvine restricted Claimant's lifting and pulling to fifteen pounds. CX-7, p.10. Moreover, Dr. Irvine only treated Claimant in December 1999, and therefore, he could not have declared Claimant permanent and stationary prior to his initial examination. In contrast, Dr. London began monitoring Claimant's condition in June 1999; he has conducted three examinations and has extensively reviewed Claimant's medical records and diagnostic studies. Thus, the Court finds that Dr. London's opinion that Claimant reached maximum medical improvement on October 20, 1999 is well-reasoned and supported by substantial evidence.

Extent of Disability

The parties agree that Claimant cannot return to his usual and customary job as a marine mechanic. Therefore, Claimant would be considered permanently and totally disabled unless Employer established suitable alternative employment. See *Clophus v. Amoco Productions, Co.*, 21 BRBS 261 (1988). The employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience and physical restrictions. See *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980). If the employer satisfies its burden and establishes suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See *Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993); *Williams v. Halter Marine Service*, 19 BRBS 248 (1987).

The judge may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. See *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985); *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983). The judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring the local job opportunities. See *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Employer argues that the positions of appointment setter, unarmed security guard, inside sales representative, and outside sales representative are suitable alternative positions. Employer relies on the Labor Market Survey ("Labor Survey" or "Survey") performed in December 1999 by Amy Wise, a vocational case manager. EX-5. Ms. Wise considered Claimant's age, medical history, education, vocational skills, and physical limitations in determining suitable alternative employment for Claimant. EX-5, p.24. Ms. Wise testified that she confirmed with employers the amount of prolonged sitting, standing and

⁴⁰ Dr. Irvine's proposed work limitations: light-duty work, no excessive stooping and bending, no lifting, pushing or pulling over fifteen pounds. CX-7, p.10.

walking required for each position. Tr.194-196.

Claimant argues that Ms. Wise did not consult with any of the treating doctors in making her evaluation, but simply relied on the opinion of Employer's expert Dr. London. Claimant's argument is misplaced. Ms. Wise explained that at the time of the Labor Survey, only Dr. London's permanent and stationary report contained defined work restrictions. Moreover, Ms. Wise testified that she reviewed the medical records of Dr. Roe, Claimant's initial treating physician. Tr.190. She further noted that Dr. Loddengaard was not contacted when she performed the December 1999 Survey because he was not Claimant's treating physician at that time. Tr.190.

Claimant also contends that Ms. Wise first learned of Dr. Irvine's December 30, 1999 work restrictions on the day of the trial. This factor does not affect the accuracy of the Survey as Dr. Irvine's restrictions are quite similar to Dr. London's. Although Dr. Irvine limited Claimant's lifting to 15 pounds, which is 25 pounds less than what Dr. London recommended, the lifting requirements for the jobs listed in the Survey do not exceed 5 pounds.

Claimant further contends that the Survey should be rejected as it ignores the recommendations of Claimant's treating physicians, Drs. Loddengaard and Sasaki. Despite the questions surrounding Dr. Loddengaard's assessment of Claimant's permanent and stationary date, the undersigned finds merit in Dr. Loddengaard's opinion that Claimant's condition precludes him from working on a full-time basis. Although Dr. Loddengaard's work restrictions⁴¹ were based on Claimant's representations, there is sufficient evidence to find that Claimant does experience some degree of pain or discomfort: being treated by a pain specialist; taking pain medication; receiving epidural injections; participating in twelve months of physical therapy. Proof of disability is also evident from Claimant's medical examinations: asymmetrical reflexes; antalgic limp and Trendelenburg gait; consistent complaints of low back pain and left lower extremity pain and weakness. See CX-6; CX-13. Therefore, the Court accepts Dr. Loddengaard's finding that Claimant's work capacity is limited to four hours per day.

Employer asserts that the twelve jobs listed in the Survey constitute suitable alternative employment; however only the unarmed security guard position with Golden Eagle Security appears to be compatible with Claimant's physical limitations. According to the Survey, this is a part-time position where Claimant would be assigned a sedentary post located no more than 10 miles from his residence, and he could alternate standing and sitting as needed. Although this position allows for a 20-hour work week, the evidence does not specify the number of hours per shift, or confirm the employer's willingness to allow Claimant to work

⁴¹ Dr. Loddengaard's work restrictions for Claimant are: a four-hour work day at a sedentary position with the option of alternating positions at will and lifting limited to 15 pounds. CX-16, p.55.

four hours per day. Therefore, Employer has not adequately demonstrated that the unarmed security guard position is compatible with Claimant's work restrictions.

In sum, the undersigned concludes that Claimant is restricted to working four-hour shifts. However, Employer failed to ascertain whether the unarmed security guard position, the only position in the Survey specifying part-time employment, will accommodate such a restriction. As such, Employer has not established suitable alternative employment. Accordingly, the Court finds that Claimant is permanently and totally disabled. Claimant is entitled to permanent total disability benefits as of the date of maximum medical improvement, October 20, 1999, at the maximum compensation rate of \$871.76.

Section 8(f) Relief

To obtain relief from Section 8(f) of the Act, an employer must show: (1) that a claimant had a permanent partial disability prior to his or her work-related injury, (2) that the pre-existing disability was manifest prior to the injury for which compensation is being awarded, and (3) that the pre-existing disability contributed to the claimant's ultimate permanent disability in the specific manner prescribed in the Act. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982).

In this case, Employer contends that it is entitled to Special Fund relief because Claimant suffered from a pre-existing disability prior to the March 3, 1999 injury, and that the resulting disability from the subject injury was materially and substantially greater because of Claimant's pre-existing condition.

On June 29, 2000, the Director informed Employer that its Section 8(f) application had been denied because the issue of contribution had not been finalized. See Director's Letter, EX-11. As the Director concedes that the first two elements for obtaining Section 8(f) relief have been satisfied, the following analysis will be limited to the "contribution" requirement.

Contribution to the Ultimate Permanent Disability.

The third requirement for obtaining Section 8(f) relief is proof that the pre-existing disability contributed to Claimant's ultimate permanent disability in the manner prescribed in the Act. As noted above, the Director notified Employer that its application was denied as the "issue of contribution from both a medical and economical aspect have not been resolved. . . . In the event the employer/carrier stipulates to PPD or PTD, we would likely recommend approval of the application." EX-11, p.66. On June 6, 2001, the Court issued a Notice Concerning Application for Special Fund Relief ("Notice," ALJX-6) notifying the District Director that it had made a preliminary determination that Claimant's condition had reached

permanent and stationary status, and that the Director was invited to submit his statement of position concerning Employer's 8(f) application. The Director was advised that failure to submit a response on or before 10 days from the date the Notice was issued could result in a finding that the Director had conceded entitlement to Section 8(f) relief. To date, the Court has not received the Director's response. Thus, the Court proceeds with its Section 8(f) analysis having received no position statement from the Director other than the statement that the Director "would likely recommend approval of the application" once permanency is established. EX11, p. 66.

To satisfy the contribution requirement, the employer must establish two factors. First, the employer must establish that the ultimate disability is not due solely to the subsequent injury, regardless of whether the ultimate permanent disability is partial or total. See 20 C.F.R. § 702.321(a)(1)(iv). Second, when an ultimate permanent disability is only partial rather than total, the employer must also establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. § 702.321(a)(1). This requirement is satisfied by determining what level of disability would have resulted from a claimant's work-related injury if the claimant had not already had a pre-existing disability at the time of injury. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 8 F.3d 175, 185 (4th Cir. 1993).

In the case at bar, it is clear that Claimant's existing disability is not due solely to the March 1999 industrial injury. Dr. London opined that Claimant was suffering from a pre-existing impairment in his lower back as a result of the May 1998 injury, and that that pre-existing disability was aggravated by the March 1999 injury. He further opined that the pre-existing disability combined with the March 1999 incident "produced a greater total impairment than would have been present from the [March 1999] incident alone." EX-19, p.180. Dr. Loddengaard concurred with Dr. London's assessment. CX-16, pp.63-64. He concluded that the resulting disability from the March 1999 work injury was materially and substantially greater because of Claimant's pre-existing condition arising from the May 1998 industrial accident. CX-17, p.64. Accordingly, the undersigned finds that Employer has satisfied all of the requirements for Section 8(f) relief.

Conclusion

Based on substantial evidence of record the Court finds that:

Claimant's condition became permanent and stationary on October 20, 1999, and Employer has not established suitable alternative employment. As such, Claimant is entitled to permanent total disability benefits beginning October 20, 1999 at the maximum compensation rate of \$871.76.

Claimant is entitled to all appropriate medical treatment pursuant to Section 7 of the Act.

Employer is entitled to Section 8(f) relief.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, the Court issues the following Order:

1. Employer shall pay Claimant temporary total disability benefits at the maximum compensation rate of \$871.76 per week from March 4, 1999 through October 19, 1999.
2. Employer shall pay Claimant permanent total disability benefits at the maximum compensation rate of \$871.76 per week from October 20, 1999 through the present and continuing.
3. Beginning 104 weeks from October 20, 1999, and until ordered otherwise, the Special Fund shall pay Claimant compensation of \$871.76 per week for permanent total disability.
4. Employer shall receive credit for all compensation paid to Claimant.
5. Employer shall provide Claimant all medical care that may in the future be reasonable and necessary for the treatment and sequelae of the compensable injuries.
6. The District Director shall make all calculations necessary to carry out this Order.
7. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the Employer's counsel within 21 days of the date this Decision and Order is served. Employer's counsel shall provide the undersigned and Claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of the Statement of Objections, counsel for Claimant shall initiate a verbal discussion with counsel for Employer in an effort to amicably resolve as many of Employer's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of Employer's Statement of

Objections, Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with Employer's counsel, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Employer no later than 30 days after service of Employer's Statement of Objections. Within 14 days after service of the Final Application, Employer shall file a Statement of Final Objections and serve a copy on counsel for Claimant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

IT IS SO ORDERED.

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ANNE BEYTIN TORKINGTON

Administrative Law Judge

San Francisco, California

ABT:jrh